FILED
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

IN THE OCTOBER TERM, 1942

No. 991

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM R. MING, JR.,
1820 California Street, N.W.,
Washington, D. C.,
JOSEPH E. SNOWDEN,
HEBER T. DOTSON,
Chicago, Illinois,
Counsel for Petitioner.

WILLIAM R. MING, JR.,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
Petition	1-7
Summary of Statement of Matter Involved	2-6
A. The Proceedings	2-3
B. Statement of Facts	3-6
Questions Presented	6
Reasons Relied on for Allowance of the Writ	7
Brief in Support of the Petition	8
Statement of the Case	8-9
Grounds on Which Jurisdiction of this Court is Invoked	9
Specifications of Errors	10

SUMMARY OF THE ARGUMENT.

I. The Decision of the Circuit Court of Appeals is in Conflict with the Applicable Decisions of this Court	12-30
A. Misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment if that misuse is in excess of authority	12-18
B. Petitioner was deprived of the equal protection of the laws of the State of Illinois by respondents exercising state authority in violation of the Fourteenth Amendment	18-25
1. The "Equal Protection" clause applies to executive and administrative action	22-24
2. Respondents' action was state action within the meaning of the Fourteenth Amendment	24-25

PAGE

SUMMARY OF THE ARGUMENT (Continued).

C. Respondent deprived petitioner of a fundamental liberty without due process in violation of the Fourteenth Amendment 25-30

1. Arbitrary and malicious action cannot constitute "Due Process" 27-30

II. This Case Presents Important Questions of Federal Law Which Should Be Settled by this Court 30

A. Whether the misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment, even if that misuse is in excess of authority, is important to the enforcement of the Fourteenth Amendment 30-31

B. The extent of the protection affording the right of every citizen to be a candidate for public office by the Constitution of the United States is a fundamental question unsettled by this Court 31-32

Argument 12-32

CASES CITED.

Allegeyer v. Louisiana, 165 U. S. 578, 589 (1897) 26

Alston v. School Board of the City of Norfolk, 112 F. (2d) 992, cert. den. 331 U. S. 693 (1940) 22-24

Barbier v. Connolly, 113 U. S. 27, 32 (1885) 20

Barney v. New York, 193 U. S. 430, 437 (1904) ..... 7, 12, 13 note, 14, 16, 30

Butler v. Perry, 240 U. S. 328 (1916) 26

Coppage v. Kansas, 236 U. S. 1 (1915) 26

Crandall v. Nevada, 73 U. S. 35, 44 (1867) 25

Cummings v. Missouri, 71 U. S. (4 Wall.) 277, 321 (1866) 31

CASES CITED (Continued). PAGE

Des Moines v. Des Moines City Railway, 214 U. S. 179 (1909) 14

Ex Parte Young, 209 U. S. 123; 52 L. Ed. 714 (1908) 24

Fletcher v. Tuttle, 151 Ill. 41, 53; 37 N. E. 683, 686 (1894) 25

Gillespie v. People, 188 Ill. 176, 182, 183; 58 N. E. 1007, 1009 (1900) 29

Hayes v. Missouri, 120 U. S. 68 (1886) 20

Home Telephone and Telegraph Co. v. Los Angeles, 227 U. S. 278, 287, 294 (1913) 15, 16, 17, 24

Hurtado v. California, 110 U. S. 516, 525 (1884) 19, 28

Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239, 246 (1931) 16, 17

Josma v. Western, 249 Ill. 508, 514; 94 N. E. 945, 946 (1911) 29

Mills v. Board of Education of Ann Arundel County, 30 F. Supp. 245 (1939) 22, 24

Mills v. Lowndes, 26 F. Supp. 792 (1939) 22

Minersville School District v. Gobitis, 310 U. S. 586 (1940) 26

Missouri ex. rel. Gaines v. Canada, 305 U. S. 337 (1938) 21, 22

Owensboro Co. v. Owensboro, 200 U. S. 38, 47 (1906) 12 note

People ex rel. Breckon v. Board of Election Commissioners, 211 Ill. 9, 77 N. E. 321 (1906) 25

People v. Hurlbut, 24 Mich. 44, 107; Am. Rep. 103, 114, 115 (1871) 26, 31, 32

People v. Niesman, 356 Ill. 322, 326, 190 N. E. 668 (1934) 29

Raymond v. Chicago Traction Co., 207 U. S. 20, 37 (1907) 12, 13, 14

PAGE

CASES CITED (Continued).

Siler v. Louisiana and Nashville R. R., 213 U. S. 175, 192 (1909) 14

South Chicago City Railway Co. v. Baird, 114 Fed. 557 (C.C.N.D. Ill., 1902) ..... 13 note

Standard Scale Co. v. Farrell, 249 U. S. 571, 577 (1919) 24

State v. Julow, 129 Mo. 163, 172, 173 (1895) 29

Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 352 (1918) 20

Truax v. Corrigan, 257 U. S. 312, 331-333 (1921) 19, 22, 29

Truax v. Raich, 239 U. S. 33 (1915) 26

U. of Md. v. Murray, 169 Md.; 182 Atl. (Md.) 590 (1935) 21, 24

United States v. Classic, 313 U. S. 299, 326 (1941) 17, 25

West v. Bliley, et al., 33 F. (2d) 177 (1929); affirmed 42 F. (2d) 101 (C.C.A. 4th Cir. (1930)) 25

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923) 26

Yick Wo v. Hopkins, 118 U. S. 356, 373-374 (1886) 23, 29

CONSTITUTION, STATUTES CITED.

Ill. Cont., Art IV, Secs. 7 and 8 4

Ill. Rev. Stat., chap. 46, pars. 420 and 456 4

Ill. Rev. Stat., chap. 46, 444 *et seq.* 4

Ill. Rev. Stat., chap. 46, pars. 449-453 4

Ill. Rev. Stat., chap. 46, pars. 454-456 ..... 4, 24, 30

U. S. Const., Art. XIV, par. 1 ..... 10, 11, 14, 15, 16, 21, 24, 25, 27, 31

8 U. S. C., pars. 41, 43 and 47 (3) 2, 9, 17

18 U. S. C., pars 51, 52, pars. 19, 20 Crim. Code 17

28 U. S. C., par. 41, (1) (12) and (14) 2

28 U. S. C. par. 347 (a) 1

IN THE

SUPREME COURT OF THE UNITED STATES

IN THE OCTOBER TERM, 1942

No.

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Now comes your Petitioner, Joseph E. Snowden, Complainant below, and prays this Court to issue its writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Snowden* v. *Hughes, et al.*, No. 7986 in that court. The basis of this Court's jurisdiction to review that decision is § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C. § 347(a)).

I. SUMMARY STATEMENT OF MATTER INVOLVED.

A. The Proceedings.

On June 13, 1941, Petitioner filed a complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking to recover damages in the amount of $50,000 from the Respondents (Tr. 2). The jurisdiction of the district court was invoked under 28 U. S. C. § 41(1) (12) and (14), this being an action at law under the Constitution and laws of the United States, particularly the Fourteenth Amendment to the Constitution and 8 U. S. C. §§ 41, 43, and 47(3) (Tr. 3). The complaint alleged that the Respondents, Edward J. Hughes, and Louie E. Lewis, and the decedent, Henry Horner, whose co-executors are Respondents, were respectively the duly elected Secretary of State, Treasurer, and Governor of the State of Illinois, and were, *ex officio*, members of the State Primary Canvassing Board of that State (Tr. 4). The complaint charged that these state officers acting under the color of the laws of the State of Illinois had wilfully, maliciously and arbitrarily acted in connection with the general primary of April 9, 1940, so as to deprive Petitioner of the nomination of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District of Illinois, which was tantamount to election to said office, in violation of the Fourteenth Amendment (Tr. 8-9). Each of the Respondents moved to strike the complaint and to dismiss the suit (Tr. 10-14, 15-16), and the motion to dismiss the cause was sustained by the Honorable Charles E. Woodward, District Judge, on November 21, 1941, without opinion or conclusions of law (Tr. 14, 17-18). Notice of appeal to the United States Circuit Court of Appeals

for the Seventh Circuit was filed by Petitioner on February 16, 1942 (Tr. 18). On December 24, 1942, that court affirmed the judgment of the district court on the ground that the acts complained of "were forbidden by the Illinois statute" and that when "the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment" (Tr. 29-34, 132 F. (2d) 476). A petition for rehearing was filed on leave granted by that court on January 14, 1943 (Tr. 36-37), and on January 30, 1943, that petition for rehearing was denied without opinion (Tr. 38).

B. Statement of Facts.

This case having been decided below on the complaint and Respondents' motion to dismiss, the allegations of the complaint stand admitted.

All of the parties to this action, are citizens of the United States, and of the State of Illinois, and resident and domiciled in said State, as was the decedent, Henry Horner, at the time of his death (Tr. 3). Petitioner is a native-born citizen of Chicago, Cook County, State of Illinois, is more than 21 years of age and has resided in the Third Senatorial District of Illinois for more than 20 years last past (Tr. 3). At all of the times mentioned herein Petitioner was, and is, a duly and legally qualified elector under the Constitution and laws of the United States and of the State of Illinois, and is subject to none of the disqualifications provided for voting, or for holding the office of Representative in the General Assembly of Illinois under the Constitution and laws of that State and of the United States (Tr. 4).

For more than 30 years Petitioner has been, and is now, a member of the Republican Party and a believer in its tenets, and at all of the times material herein Petitioner

was legally qualified to be a candidate in a Republican primary and to be a nominee of the Republican Party (Tr. 4). At all of the times material herein, the decedent, Henry Horner, was the duly elected Governor of the State of Illinois, Respondent Edward J. Hughes was the duly elected Secretary of State of that state, and Respondent Louie E. Lewis was the duly elected Treasurer of that state (Tr. 4). Under §§ 420 and 456, chapter 46, Illinois Revised Statutes, these officers were constituted the "State Primary Canvassing Board," and were charged with the duty of canvassing the returns of primaries conducted in that state and with the obligation to issue a proclamation as to the result thereof (Tr. 4).

On April 9, 1940, a general state-wide primary election was held in the State of Illinois (Tr. 4). In the Third Senatorial District of that state the primary included a nomination of candidates of both the Republican and Democratic parties for the office of Representative in the General Assembly pursuant to §§ 444 *et seq.*, chapter 46, Illinois Revised Statutes (Tr. 4, 6). Prior to that date Petitioner's name had been duly and properly certified as a candidate for the Republican nomination for that office in accordance with §§ 449-453, chapter 46, Illinois Revised Statutes (Tr. 4). At that primary election, two, and only two, candidates for the office of Representative in the General Assembly were to be nominated by the Republican Party (Tr. 4). Although it is provided by §§ 7 and 8 of Article IV of the Constitution of the State of Illinois that "three representatives shall be elected in each Senatorial District at the general election in the year of Our Lord 1872, and every two years thereafter" (Tr. 5), the number of candidates to be nominated is governed by § 454, chapter 46, Illinois Revised Statutes (Tr. 4). Under that section the Republican Senatorial Committee of the Third Senatorial District had filed with the Board of Election Commissioners, the County Clerk of Cook County, and the Secre-

tary of State of Illinois, a proper resolution so limiting the number of Republican candidates to be nominated, and the Democratic Senatorial Committee of that district had similarly resolved that only one Democratic candidate should be nominated at that primary election (Tr. 5). In view of this action by the Republican and Democratic Senatorial Committees of that district, nomination by either of these parties was tantamount to election (Tr. 6).

Upon the closing of the polls on April 9, 1940, the votes cast by the Republican electors in the Third Senatorial District for the nomination of candidates for Representative in the General Assembly were duly canvassed by the Canvassing Board of Cook County, Illinois, and a tabulated statement of the canvass of returns showing the votes given to each of the candidates for the Republican nomination for that office in the Third Senatorial District were forwarded to the Secretary of State (Tr. 5). That canvass showed that one Charles J. Jenkins and this Petitioner were the two candidates receiving the highest number of votes for the Republican nominations (Tr. 5).

Thereafter the Respondent, Edward J. Hughes, acting as Secretary of State, received that tabulated statement of returns and compiled, certified, and issued for public distribution under the seal of the state, a certain pamphlet entitled "Official Vote of the State of Illinois Cast at the Primary Election held on April 9, 1940," showing that the said Charles J. Jenkins and Petitioner were the two candidates for the Republican nominations for Representative in the General Assembly receiving the highest number of votes in the Senatorial District (Tr. 6-7).

Under the state law it then became the duty of the Respondents, Hughes and Lewis, and the decedent, Henry Horner, acting as the State Primary Canvassing Board, to receive the tabulated statements of returns of the votes cast in the primary and to canvass those returns and to

proclaim the result thereof (Tr. 7). The board received the returns but on April 20, 1940, issued an official proclamation designating only Charles J. Jenkins as a Republican nominee for the office of Representative in the General Assembly from the Third Senatorial District (Tr. 7).

Acting in their official capacity as the State Primary Canvassing Board the Respondents, Hughes and Lewis, and the decedent, wilfully, maliciously, and arbitrarily failed and refused to file a proper and correct certificate in the office of the Secretary of State showing that Petitioner had been nominated by the Republican Party for the office of Representative in the General Assembly for the Third Senatorial District (Tr. 7-8). This unequal, unjust and oppressive administration of the laws of the State of Illinois was carried out pursuant to an agreement and combination made by these state officers (Tr. 8), and they acted under the color of the laws of that state in subjecting Petitioner to a deprivation and denial of rights and privileges secured to him by the Constitution and laws of the United States in violation of the Fourteenth Amendment to that Constitution.

II. QUESTIONS PRESENTED.

A. Is misuse of power possessed by virtue of state law state action within the meaning of the Fourteenth Amendment even if that misuse is in excess of authority?

B. Does an arbitrary, wilful and malicious refusal by state officers to carry out the requirements of the state law with respect to an individual amount to a denial of the equal protection of the laws?

C. Does the Constitution of the United States protect the right of every qualified citizen to be a candidate for public office?

III. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

1. Misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment even if that misuse is in excess of authority.
2. Arbitrary refusal of state officers to accord an individual citizen the treatment required by state law and accorded to other citizens is a denial of the equal protection of the laws.

B. This case presents important questions of federal law which should be settled by this Court.

1. Has *Barney* v. *New York*, 193 U. S. 430 (1904), been overruled?
2. Does the Constitution of the United States protect the right of every qualified citizen to be a candidate for public office?

C. The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts.

Wherefore, your Petitioner prays this Court to issue its writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Snowden* v. *Hughes, et al.*

Respectfully submitted,

(Signed) William R. Ming Jr.
1820 California St. N. W.
Washington, D. C.

Joseph E. Snowden,
Heber T. Dotson,
Counsel for Petitioner.

William R. Ming, Jr.,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

IN THE OCTOBER TERM, 1942

No.

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

Petitioner, a duly qualified elector and candidate for the office of Representative in the General Assembly, was one of the two candidates for the Republican nomination receiving the highest number of votes in that primary (Tr. 5, 6-7). The Respondents Hughes and Lewis, and the decedent, Horner, were at that time Secretary of State, Treasurer, and Governor, respectively, of the State of Illinois, and were, *ex officio*, the State Primary Canvassing Board. Despite the fact that the Cook County Canvassing Board reported to the Respondent Hughes that the Petitioner was one of the two candidates receiving the highest

number of votes for the nomination as Republican candidates for Representative in the General Assembly, and despite the fact that the Respondent Hughes, acting Secretary of State, had published that fact under the seal of the State (Tr. 6-7), the State Primary Canvassing Board arbitrarily, wilfully, and maliciously failed and refused to certify Petitioner's nomination.

The Republican Senatorial Committee for the Third Senatorial District, where Petitioner was a candidate, had limited nominations for representatives by that party to two, and the Democratic Senatorial Committee in that district had limited nominations of that party to one (Tr. 4, 5). Since the Constitution of the State of Illinois provides for the election of three representatives from each Senatorial District, nomination was, therefore, tantamount to election (Tr. 6).

This action was brought in the District Court for the Northern District of Illinois, Eastern Division, under the authority of 8 U.S.C. §§ 41, 43, and 47(3), for damages on account of this deprivation by Respondents Hughes and Lewis and the decedent, of Petitioner's rights under the Constitution and laws of the United States. The district court sustained Respondents' motion to dismiss the complaint and that judgment was affirmed by the United States Court of Appeals for the Seventh Circuit (Tr. 29-33).

Grounds on Which Jurisdiction of This Court Is Invoked.

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.
2. This case presents important questions of federal law which should be decided by this Court.
3. The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts.

Specification of Errors.

The Circuit Court of Appeals erred in that:

1. It decided that "when the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment."
2. It refused to hold that the Petitioner had been deprived of rights guaranteed, secured, and protected by the Constitution and laws of the United States.

Summary of the Argument.

I The Decision of the Circuit Court of Appeals is in Conflict with the Applicable Decisions of this Court.

A. Misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment if that misuse is in excess of authority.

B. Petitioner was deprived of the equal protection of the laws of the State of Illinois by respondents exercising state authority in violation of the Fourteenth Amendment.

1. The "Equal Protection" clause applies to executive and administrative action.
2. Respondents' action was state action within the meaning of the Fourteenth Amendment.

C. Respondent deprived petitioner of a fundamental liberty without due process in violation of the Fourteenth Amendment.

1. Arbitrary and malicious action cannot constitute "Due Process".

II This Case Presents Important Questions of Federal Law Which Should Be Settled by this Court.

A. Whether the misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment, even if that misuse is in excess of authority, is important to the enforcement of the Fourteenth Amendment.

B. The extent of the protection affording the right of every citizen to be a candidate for public office by the Constitution of the United States is a fundamental question unsettled by this Court.

ARGUMENT.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. Misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment even if that misuse is in excess of authority.

In affirming the judgment of the district court the court below said: "We conclude that when the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment" (Tr. 33). To support its conclusion the court relied on *Barney* v. *City of New York*, 193 U. S. 430 (1904).[1] While the court conceded that, "there can be no doubt that the broad language used in the *Barney* opinion is no longer accurate," it thought that, "the narrow holding of the *Barney* case still stands as a matter of law and as a matter of sound federal jurisprudence" (Tr. 33). We submit that this decision was contrary to an unbroken line of applicable decisions of this Court.

The first of these was in *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20 (1907), which even the court below in this

[1] The court also cited and quoted from *Owensboro Co.* v. *Owensboro*, 200 U. S. 38, 47 (1906) (Tr. 32). The decision in that case, however, was based on this Court's conclusion that the action complained of did not result in the deprivation of a federal right.

case recognized as "limiting" the authority of the *Barney* case. In the *Raymond* case a suit was brought by the Traction Company to enjoin the taxing officers of Cook County from collecting certain taxes alleged to have been assessed by the State Board of Assessment in violation of the Fourteenth Amendment. The plaintiff's bill specifically set forth the provisions of the Illinois constitution and statutes requiring uniformity of taxation. The Circuit Court granted relief on the merits without discussing the question of jurisdiction.[2] In affirming the decree this Court said:

> "The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the State in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her or its property,' was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the State. This action resulted in an illegal discrimination, which, under these facts, was the action of the State through the board" (207 U. S. 20, 37).

Mr. Justice Peckham speaking for the majority in that case disposed of the *Barney* case by saying: "*Barney* v. *City of New York* . . . holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State. Such is not the case here."[3]

---

[2] *South Chicago City Railway Co.* v. *Baird,* 114 Fed. 557 (C.C.N.D. Ill., 1902).

[3] *Ibid.* That distinction is of doubtful validity since the decision in the *Barney* case appears to have been based on the ground that the construction complained of there was "unauthorized" by the city and it had been so determined by the Supreme Court of New York. 193 U. S. 430, 437. In both the *Raymond* case and the instant case the action of the state officers complained of was "unauthorized" in that the applicable provisions of the State constitution and statutes did not authorize misuse of the delegated power.

In the instant case, as in the *Raymond* case, the applicable provisions of the state statutes and constitution required these Respondents to exercise their authority with uniformity. The gravamen of Petitioner's complaint is that they failed to do so in his case and the decision of the court below that their failure so to do was not "an action of the state for the purposes of the Fourteenth Amendment" is inconsistent with the decision of this Court in the *Raymond* case.

In *Siler* v. *Louisville and Nashville R. R.*, 213 U. S. 175 (1909), this Court sustained the jurisdiction of the Circuit Court to enjoin a maximum rate order issued by the Railroad Commission of Kentucky pursuant to a legislative act. In that case it was averred that the Railroad Commission had no power or authority to make or fix the rates complained of, "and that the Commission's order was unauthorized by statute." Of the objection to the lower court's jurisdiction based on the *Barney* case this Court said: "If the averment as to the invalidity of the order of the Commission were the only ground upon which a Federal question was founded, and if the bill alleged that the order was invalid because it was not authorized by the State, either by statute or in any other way, the objection might be good, but the bill sets up several Federal questions" (213 U. S. 175, 192). By this test likewise the instant case falls within the federal jurisdiction, for here as in the *Siler* case "the bill sets up several Federal questions" with respect to the scope and extent of the protection afforded by the Fourteenth Amendment.

Similarly this Court sustained the federal jurisdiction in *Des Moines* v. *Des Moines City Railway*, 214 U. S. 179 (1909). In that case the Circuit Court had enjoined the defendant city from impairing the obligation of a contract despite the city's claim that since there was a contract clause in the state constitution which would have invalidated such a law there was no state action and hence no

federal question. So little was this Court impressed by the jurisdictional question raised that, although that issue had been argued, the case was decided on its merits with no reference to the jurisdictional question.

The court below in the instant case cited *Home Telephone and Telegraph Co.* v. *Los Angeles,* 227 U. S. 278 (1913), but it failed to recognize its authority. In that case the petitioner sought an injunction in the federal district court to restrain the officials of the City of Los Angeles from enforcing a telephone rate ordinance on the ground that the rates were confiscatory and therefore in violation of the Fourteenth Amendment. The city filed a plea to the jurisdiction of the court setting up the due process clause of the California constitution which also prohibits confiscation, and the fact that there was no diversity of citizenship. This court reversed an order dismissing the bill for want of jurisdiction. Then Chief Justice White speaking for a unanimous court said:

> ". . . the settled construction of the [Fourteenth] Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrong-doer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, *inquiry concerning whether the State has authorized the wrong is irrelevant* and the Federal judicial power is competent to

afford redress for the wrong by dealing with the officer and the result of his exertion of power" (227 U. S. 278, 287). (Italics supplied.)

Of the *Barney* case it was said: "... there is no ground for finding that that case is authority for overruling the settled doctrine, which, abstractly at least, it recognized. If there were room for such conclusion in view of what we have said it would be our plain duty to qualify and restrict the *Barney* case insofar as it might be found to conflict with the ruling here applied."[6] The instant case, like the *Home Telephone and Telegraph Co.* case, challenges the misuse of power by state officers to commit a wrong forbidden by the Fourteenth Amendment and we submit that here, too, "the Federal jurisdictional power is competent to afford redress for the wrong by dealing with the official and the result of his exertion of power."

Again in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 246 (1931), this Court held that "when a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of state law." In that case this Court reviewed a decision of the Supreme Court of Iowa denying relief to two banks which complained of unequal taxation contravening both the state law and the equal protection clause of the Fourteenth Amendment. While the state court found, or assumed, systematic discrimination as charged, it declared that the wrongful exaction was made without authority from the state and that the banks had no other remedy than to await action by the taxing authorities to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection.

---

[6] 227 U. S. 278, 294.

Mr. Justice Brandeis speaking for the court, found no cause to discuss the *Barney* case at any length because the *Iowa-Des Moines* case arose in a state court, but he said: "Some expressions in the opinion in the *Barney* case, said to be inconsistent with the conclusions stated above, have been disapproved by this court. *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 294" (284 U. S. 239, 247).

Most recently in *United States* v. *Classic*, 313 U. S. 299, 326 (1941), this Court had occasion to say: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law." In that case this Court held that fraudulent acts by Louisiana election officials amounted to a deprivation of rights secured and protected by the Constitution and laws of the United States in violations of §§ 19 and 20 of the Criminal Code (18 U.S.C. §§ 51, 52). Those sections and 8 U.S.C. §§ 41, 43, and 47(3) on which Petitioner relies, are all part of the statutory scheme devised by the Congress to effectuate the purposes of the Fourteenth Amendment. The tests for determining what action is "state action" must be the same for both the criminal and civil liability. The conduct of the state officers in the instant case was exactly parallel to that of the respondents in the *Classic* case. It follows, therefore, that the decision of the court below in the instant case was inconsistent with the decision of this Court in the *Classic* case.

The importance of the effect of state law on the determination of what constitutes state action for the purposes of the Fourteenth Amendment has been considered by this Court in all of the cases discussed. In all of them, this Court had decided that misuse of power possessed by virtue of state law and made possible only because of the authority of the state law is "state action" within the meaning of the Fourteenth Amendment. The decision of the court below in the instant case is inconsistent, therefore, with the applicable decisions of this Court.

B. Petitioner was deprived of the equal protection of the laws of the State of Illinois by respondents exercising state authority in violation of the Fourteenth Amendment.

Petitioner and one Charles J. Jenkins were the two candidates receiving the highest number of votes for the Republican nomination for representative in the General Assembly at the primary on April 9, 1940 (Tr. 5). Under the provisions of the Illinois statutes it was the duty of the Respondents Hughes and Lewis and the decedent Horner as members of the State Primary Canvassing Board to receive the tabulated statements of the results of the votes cast in the primary from the canvassing boards of the counties in the state, to canvass those results and to proclaim that the candidates receiving the highest number of votes had been nominated. In this case the Respondent, Edward J. Hughes, Secretary of State, received the tabulated statement of returns from the Canvassing Board for Cook County and the County Clerk of Cook County showing that Petitioner and Charles J. Jenkins were the two candidates receiving the highest number of votes for the Republican nomination for Representative in the General Assembly in the Third Senatorial District. Moreover, the Respondent Hughes compiled, certified and issued for public distribution a pamphlet under the state seal setting forth that fact. Nevertheless, on April 29, 1940, the State Primary Canvassing Board issued its official proclamation designating only Charles J. Jenkins as nominee of the Republican Party. In failing to fulfill the obligation imposed upon them by the state law, these state officers denied to Petitioner the equal protection of the laws which the Fourteenth Amendment to the Constitution of the United States requires of every state and its officers.

It is a fundamental principle of our democratic government that every person within the jurisdiction of the State

shall be treated equally in the application and enforcement of the laws of that state. The late Chief Justice Taft fully described the scope of this obligation of the several states of the Union in *Truax* v. *Corrigan*, 257 U. S. 312, 331-333 (1921), where he said:

> "This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the Amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause, brought down from Magna Charta, was found in the early state constitutions, and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado* v. *California*, 110 U. S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of

laws and not of men,' 'No man is above the law,' all are maxims showing the spirit in which legislatures, executives said courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty is aimed at undue favor and individual or class prejudice, on the one hand, and at hostile discrimination or the operation of inequality on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this Court in *Barbier* v. *Connolly*, 113 U. S. 27, 32, of the equality clause, said—'Class legislation, discriminating against some and favoring some, is prohibited, but legislation which, in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.' In *Hayes* v. *Missouri*, 120 U. S. 68, the Court speaking through the same Justice said the Fourteenth Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.'"

To the same effect was the statement of Mr. Justice McReynolds in *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S. 350, 352 (1918), where he said:

"The purpose of the equal protection clause of the XIV Amendment is to secure every person within

> the state's jurisdiction against intentional and arbitrary discrimination whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. . . ."

This proposition was applied by this Court in *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938). There petitioner, a Negro, had been denied admission to the school of law of the State University of Missouri solely on account of his race and color. After observing that the separate school system for Negroes which the State of Missouri had provided did not include an opportunity for legal education, the court held that in refusing Gaines the opportunity which was available to white citizens of the State, the State was violating the "Equal Protection" clause of the Fourteenth Amendment. The Court recognized the validity of the proposition that no citizen of a state had a *right* to education at the expense of the state, but said:

> "By the operation of the laws of Missouri a privilege had been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State; the Negro resident having the same qualification is refused it there and must go outside of the state to obtain it. That is the denial of the equality of legal right to the enjoyment of the privilege which the state has set up, and the provision of the payment of tuition fees in another state does not remove the discrimination." 305 U. S. 337, 349; 83 L. Ed. 208, 213.

A state court reached the same conclusion, in *U. of Md.* v. *Murray*, 169 Md. 478; 182 Atl. (Md.) 590 (1935).

On the same principle federal courts have held that the payment of Negro teachers on a scale different from that

set up for white teachers violates the equal protection clause. *Alston* v. *School Board of the City of Norfolk*, 112 F. (2d) 992, cert. den. 311 U. S. 693 (1940); *Mills* v. *Lowndes*, 26 F. Supp. 792 (1939) and *Mills* v. *Board of Education of Anne Arundel County*, 30 F. Supp. 245 (1939).

It is significant that all of these cases proceed upon the theory that the requirement of the equal protection clause of the Fourteenth Amendment is met only by actual equality of treatment of every person within the jurisdiction of the state. As the then Chief Justice said in the *Gaines* case, *supra*:

> "Here petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, . . ." 305 U. S. 337, 351.

In the instant case Petitioner invokes the aid of the federal courts in securing redress for Respondents' denial to him of the equality of treatment and equal protection of the laws which the Constitution of the United States requires. Petitioner has alleged, and Respondents have admitted, that in carrying out their official functions in connection with the primary of April 9, 1940, these respondents wilfully, arbitrarily, and maliciously refused to obey the clear and express provision of the laws of the State of Illinois. Their action violated the requirement of the "Equal Protection" clause.

1. The "Equal Protection" clause applies to executive and administrative action.

Like the other provisions of Section One of the Fourteenth Amendment the "Equal Protection" clause applies to action by executive and administrative officers of the state as well as to legislative action. This was recognized in *Truax* v. *Corrigan*, *supra*, and in the leading case of

Yick Wo v. *Hopkins*, 118 U. S. 356 (1886). In the latter case the court considered the complaint of Chinese residents of the State of California that an ordinance of the City of San Francisco, which required a license to operate a laundry in a frame building, was administered in such a fashion as to prevent Chinese from operating laundries in such buildings although permitting white persons to do so. After pointing out that the ordinance was fair enough on its face the court came to the conclusion that,

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority by an evil eye and an unequal hand so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the provision of the constitution." 118 U. S. 356, 373-374.

That conclusion fits the instant case precisely. Here, too, the statute is fair upon its face. It required Respondents to tabulate the results reported to them by the Canvassing Board of the several counties within the State and prescribed that these defendants acting as the State Primary Canvassing Board should proclaim the results of this tabulation. But the actual administration of the law fell far short of the level required by the Fourteenth Amendment since these defendants arbitrarily and wilfully refused to comply with its terms in the case of the returns from the Third Senatorial District.

The cases cited heretofore in this section all sustain the proposition of the applicability of the "Equal Protection" clause to administrative and executive action. In the *Gaines* case, *supra*, the acts complained of were those of the registrar of the state university. Clearly he was an administrative officer. A similar officer was involved in the

University of Maryland case, *supra*. In the *Alston* and *Mills* cases the defendants were superintendents and members of boards of local school districts. The administrative character of those offices is clear. Like Respondents in the instant case all of those officers were engaged in administration of laws passed by the particular state legislature. Like Respondents here their administration should have met the test of "Equal Protection," but did not.

2. Respondents' action was state action within the meaning of the Fourteenth Amendment.

It has already been demonstrated hereinbefore that the fact that the acts done by the Respondents complained of here were violative of the state law did not remove them from the prohibition of the Fourteenth Amendment. In addition it should be pointed out that under the decisions of this Court the action of Respondents was state action within the meaning of the Fourteenth Amendment.

Ex officio, the governor, secretary of state, and state treasurer are members of the State Primary Canvassing Board in Illinois. (Ill. Rev. Stats. Chap. 46, sec. 456.) In carrying out the functions of that board those officers, Respondents here, are engaged in "state action" within the meaning of that phrase as used by the courts in construing the Fourteenth Amendment. *Standard Scale Co.* v. *Farrell*, 249 U. S. 571, 577 (1919).

The sole source of authority in these officers to canvass the results of a primary election is the delegation by the legislature referred to above. The result is that these officers are empowered to exercise the legislative and executive power of the state. It is clear that such delegated power must be exercised with a due regard to the limitations of the Fourteenth Amendment. *Standard Scale Co.* v. *Farrell, supra; Ex parte Young*, 209 U. S. 123; 52 L. Ed. 714 (1908); *Home Telephone & Telegraph Co.* v. *City of Los Angeles, supra.*

The fact that this was a primary election rather than a general election did not affect the obligation of defendants to perform their duties in accordance with the Constitution of the United States. In Illinois the conduct of primary elections is a function of the state as evidenced by the elaborate regulations adopted by the legislature for their conduct, the fact that the cost is borne by the state treasury and the history of primaries in the state. *United States* v. *Classic*, 313 U. S. 299 (1941); *West* v. *Bliley, et al.*, 33 F. (2d) 177 (1929); affirmed 42 F. (2d) 101 (1930), and *People ex rel. Breckon* v. *Board of Election Commissioners*, 221 Ill. 9, 77 N. E. 321 (1906).

C. Respondents deprived petitioner of a fundamental liberty without due process in violation of the Fourteenth Amendment.

The right of which Petitioner was deprived by these state officers, Respondents here, was a right which every duly qualified citizen must have under our representative form of government; that is, the right of equality of opportunity to be chosen a representative of the people in the conduct of the affairs of government. That right is a fundamental civil right. Unless its existence is judicially recognized and protected a republican form of government is impossible. If no such right exists, then government by the will of the governed is impossible. The people under those circumstances would be at the mercy of those who, cloaking their actions under color of state authority, chose to ignore the will of the electorate. The Supreme Court of Illinois considers the right of Petitioner fundamental and says: "Every citizen has the right of voting for public office and being elected," *Fletcher* v. *Tuttle*, 151 Ill. 41, 53; 37 N. E. 683, 686 (1894). It is every citizen's right to share his government's offices and to engage in administering its functions. *Crandall* v. *Nevada*, 73 U. S. 35, 44 (1867).

While specific judicial recognition of this right is sparse, the whole history of the Fourteenth Amendment and its judicial construction supports petitioner's contention here. In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897), this Court said:

> "The liberty mentioned in that Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to impress the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

From a number of cases decided thereafter, it is apparent that this Court has construed the term "liberty," as used in the Fourteenth Amendment, to include the broad, fundamental, natural rights of free men in a free society and the Fourteenth Amendment has regularly been construed as protecting those rights against interference by state action without due process of law. See *Coppage* v. *Kansas*, 236 U. S. 1 (1915); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Butler* v. *Perry*, 240 U. S. 328 (1916); *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522 (1923); *People* v. *Hurlbut*, 24 Mich. 44, 107, 9 Am. Rep. 103, 114, 115 (1871).

In a number of subsequent decisions this Court has continued development of that basic concept of "liberty." Finally, in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), Mr. Justice Frankfurter pointed out the conflict presented in that case between the right of religious freedom, on the one hand, and the necessity of the main-

tenance of a government strong enough to protect this religious liberty on the other. The Court's decision in that case was based on the conclusion that only by the maintenance of an organized political society could freedom of religious worship be protected.

In the instant case Petitioner asks this Court to protect against arbitrary action by state officers a basic and fundamental requirement of an organized political society. Only if the Fourteenth Amendment prohibits arbitrary and discriminatory refusal by state officers to carry out the dictates and mandates of the electorate is an organized representative government possible.

We submit that in a republic dedicated to the principle of preservation of the representative form of government no civil right could be more important than the right of every qualified citizen to be a candidate for a representative office. The gravity of Respondents' conduct in the instant case is accentuated by the fact that it stands admitted in this Court that Petitioner had been duly nominated by the electorate of the Republican party at the primary involved here and that Respondents, state officers, had refused to proclaim that fact. If the liberty protected by the Fourteenth Amendment does not include the right to equal opportunity to serve in the legislative councils of the republic and the right to equal treatment at the hands of government officers in the application and the enforcement of the laws of the state, (See Point B, *supra*), the security and the protection of organized political society that this Court found to be inherent in our form of government in the *Minersville* case has no meaning.

1. Arbitrary and malicious action cannot constitute "Due Process."

It has been uniformly agreed by all courts that have considered the meaning of the "Due Process" clause that

it forbids arbitrary and discriminatory action by state officials. In *Hurtado* v. *California*, 110 U. S. 516, 535 (1884), Mr. Justice Matthews expressed the idea in the following language:

> "In the Fourteenth Amendment, by parity of reason, (due process) refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. • • •
>
> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the

decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

That fundamental proposition has been affirmed again and again by both state and federal courts. So well settled is the proposition that we refer this Court to only a few of the authorities. *Truax* v. *Corrigan*, 257 U. S. 312, 332 (1921); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366 (1886); *People* v. *Niesman*, 356 Ill. 322, 326, 190 N. E. 668 (1934); *Josma* v. *Western*, 249 Ill. 508, 514; 94 N. E. 945, 946 (1911); *Gillespie* v. *People*, 188 Ill. 176, 182, 183; 58 N. E. 1007, 1009.

The Supreme Court of Illinois has adopted the broader concept of the rights guarded and protected by the "Due Process" clause of the Constitution and says: "These terms, 'life', 'liberty' and 'property', embrace every personal, political and civil right which any person within the state may possess," (249 Ill. 508, 514; 94 N. E. 945, 946). Our liberties, personal, civil, political—in short, all that makes life worth living are grouped in these words. *State* v. *Julow*, 129 Mo. 163, 172, 173 (1895).

In the instant case Respondents arbitrarily and maliciously, and without any opportunity to Petitioner to be heard in the matter, refused to obey the general law laid down by the Legislature of the State of Illinois for the

conduct of primary elections. Despite the clear requirement of the state Election Laws, (Ill. Rev. Stats. ch. 46, §§ 454 and 456), that they should proclaim as nominated those two persons having the highest number of votes, these Respondents made a "special" rule to deal with the case of Petitioner. In spite of the fact that Petitioner had received the second highest vote in his district, and that fact had been attested to by one of these Respondents, Edward J. Hughes, over the great seal of his office, these Respondents arbitrarily refused to proclaim Petitioner's nomination.

We submit that the very purpose of the "Due Process" clause was to protect all persons from such high-handed and outrageous actions as these. In the language of the *Hurtado* case quoted above, such "arbitrary power enforcing its edicts to the injury of the persons and property of its subjects is not law." Rather it is anarchy, and the courts of the United States have been delegated the function of protecting persons like Petitioner from such unlawful conduct.

II.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. Whether the misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment, even if that misuse is in excess of authority, is important to the enforcement of the Fourteenth Amendment.

The reliance by the court below on *Barney* v. *New York*, *supra*, in reaching a decision which is contrary to the decisions of this Court discussed in Point I hereof, re-

quires that this Court review this case. Most state constitutions contain "Due Process" clauses similar in content and construction to that of the Fourteenth Amendment to the Constitution of the United States. Enforcement of the Fourteenth Amendment, therefore, requires that this Court review and reverse the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case in order to prevent possible conflicts and confusion among the district and circuit courts in their enforcement of the Fourteenth Amendment and other constitutional limitations on state action.

The importance of this question goes far beyond the instant case. It includes the whole range of cases and problems arising with respect to the limitations contained in the Constitution on the powers of the states. Judicial protection of the rights secured by those limitations on state action depend upon this Court's construction of those limitations. It is vital to that judicial protection that the question wrongly decided by the court below be considered by this Court.

B. The extent of the protection affording the right of every citizen to be a candidate for public office by the Constitution of the United States is a fundamental question unsettled by this Court.

Mr. Justice Fields, speaking for this court, in *Cummings* v. *Missouri*, 71 U. S. (4 Wall) 277, 321 (1866), said:

> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law."

Judge Cooley, speaking for the Supreme Court of Michigan, says that "Constitutional freedom means something

more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured and guarded; in one's liberties as a man and a citizen—his right to vote, his right to hold office," that they are guarded and protected and not held at the mercy and discretion of any one man. *People* v. *Hurlbut*, 24 Mich. 44, 107.

Existence of orderly representative government in the absence of constitutional limitation on arbitrary action by state officers which interferes with the choice of representatives in legislative councils is impossible. The instant case raises squarely the question to whether the Constitution prohibits arbitrary interference by state officers with the exercise of the choice of representatives by the people. It is important to continuation of orderly representative government in the several states that this Court determine the extent of protection afforded by the federal Constitution and the federal courts against arbitrary action by state officers even in state elections.

CONCLUSION.

We submit that this Court should review the decision of the United States Circuit Court of Appeals for the Seventh Circuit affirming the dismissal of Petitioner's complaint and that the decision should be reversed.

Respectfully submitted,

WILLIAM R. MING, JR.,
1820 California Street, N.W.,
Washington, D. C.

JOSEPH E. SNOWDEN,
HEBER T. DOTSON,
Chicago, Illinois,
Counsel for Petitioner.

WILLIAM R. MING, JR.,
Of Counsel.